

DOCKET NO. 3:07-CR-79-FDW-6

Defendants.

ORDER

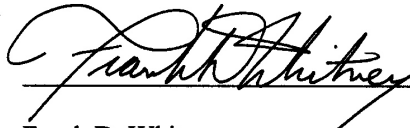
In determining whether a new trial should be granted under Rule 33 on the basis of newly discovered evidence, the Fourth Circuit utilizes a five-part test: (i) is the evidence, in fact, newly discovered; (ii) are facts alleged from which the court may infer due diligence on the part of the

movant; (iii) is the evidence relied upon not merely cumulative or impeaching; (iv) is the evidence material to the issues involved; and (v) would the evidence probably result in acquittal at a new trial? United States v. Chavis, 880 F.2d 788, 793 (4th Cir. 1989). In this case, Defendant has failed to make even a threshold showing. Specifically, the claimed “newly discovered evidence” regarding the veracity of co-defendant Juan Garza’s debriefing was disclosed to defense counsel in a series of emails from the Assistant United States Attorney prior to Defendant’s trial. Furthermore, any testimony that Mr. Garza could provide at a retrial is at best characterized as impeaching, and in fact is more likely to be inculpatory against the Defendant.

For these reasons, Defendant’s motion for a new trial is DENIED.

IT IS SO ORDERED.

Signed: March 13, 2009


Frank D. Whitney
United States District Judge

